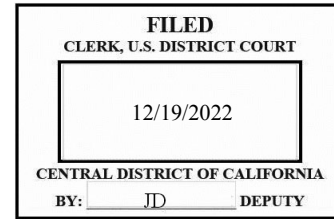


1 XINGFEI LUO
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4
5 Petitioner in Pro Se



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7
8 **UNITED STATES DISTRICT COURT**
9 **CENTRAL DISTRICT OF CALIFORNIA**

10
11 XINGFEI LUO,
12 Petitioner,
13 v.
14 THE PEOPLE OF THE STATE OF
15 CALIFORNIA
16 Respondent.

No. 8:22-CV-01640-MEMF-KES

**REPLY ISO MOTION TO STAY
PETITION FOR WRIT OF HABEAS
CORPUS PURSUANT TO RHINES**

Action filed: September 6, 2022

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18
19 Xingfei Luo (Petitioner) submits her reply in support of her motion to stay her
20 federal habeas petition under *Rhines* while she is presenting her unexhausted claims in
21 state court.

22 It likely would be an abuse of discretion for a district court to deny a stay and
23 dismiss a mixed petition if the petitioner had good cause for his failure to exhaust, his
24 unexhausted claims are potentially meritorious, and there is no indication that he engaged
25 in intentionally dilatory litigation tactics. *Rhines v. Warden*, 544 U.S. 269, 270 (2005).
26 Such a petitioner's interest in obtaining federal review of his claims outweighs the
27 competing interests in finality and speedy resolution of federal petitions. *Id.*

28 Tactically admitting that Petitioner had good cause for her failure to exhaust, her

1 unexhausted claims are potentially meritorious, and there is no indication that she engaged
2 in intentionally dilatory litigation tactics, Respondent argues that there is no imminent
3 danger that the federal statute of limitations will expire. ECF 16 at 3. However,
4 Respondent has cited neither statutory nor judicial authority which suggests that whether
5 there is imminent danger that the federal statute of limitations will expire is one of the
6 conditions the district court should evaluate when deciding whether a mixed petition
7 should be stayed. Indeed, *Rhines* instructed that the district court should consider only
8 three conditions: “(1) the petitioner had good cause for his failure to exhaust, (2) his
9 unexhausted claims are potentially meritorious, and (3) there is no indication that the
10 petitioner engaged in intentionally dilatory litigation tactics” when deciding whether “the
11 district court should stay, rather than dismiss, the mixed petition.” *Id.* at 277–78.

12 Congress enacted AEDPA, which imposed a one-year statute of limitations for the
13 filing of a federal habeas petition. While that limitations period is tolled “during the
14 pendency of a ‘properly filed application for State post-conviction or other collateral
15 review,’ [28 U.S.C.] § 2244(d)(2), the filing of a petition for habeas corpus in federal
16 court does not toll the statute of limitations.” *Id.* at 274–75, 125 S.Ct. 1528.

17 *Rhines* therefore authorized a “ ‘stay-and-abeyance’ procedure,” under which the
18 district court, “rather than dismiss the mixed petition,” may “stay the petition and hold it
19 in abeyance while the petitioner returns to state court to exhaust his previously
20 unexhausted claims.” *Id.*

21 *Rhines* acknowledged “the gravity of th[e] problem” of the interaction of total
22 exhaustion rule with AEDPA's one-year statute of limitation, “and the difficulty it has
23 posed for petitioners. “[P]etitioners who come to federal court with ‘mixed’ petitions run
24 the risk of forever losing their opportunity for any federal review of their unexhausted
25 claims,” *id.* at 275, because, absent a stay, they are presented with two choices, each of
26 which will ordinarily result in precluding some or all of their claims: Either they may
27 voluntary dismiss unexhausted claims, proceeding on only the exhausted ones, or they
28 may decline to do so, leading to dismissal of the entire petition. Either kind of dismissal

1 would be, in form, without prejudice. But, because the one-year statute of limitations is
 2 not tolled while the federal petition is pending, *Duncan v. Walker*, 533 U.S. 167, 181, 121
 3 S.Ct. 2120, 150 L.Ed.2d 251 (2001), and because state proceedings can be lengthy¹ and
 4 unpredictable, in most cases either option will mean that a petitioner will be barred from
 5 federal review of some or all of his claims by the time he exhausts them. If a petitioner
 6 voluntarily dismisses his unexhausted claims, it is very likely that final state court
 7 exhaustion of unexhausted claims will come too late to allow the claims to be heard in
 8 federal court, whether because (1) the statute of limitations period will have run on the
 9 claims and they will not relate back to the filing of the petition because they do not “arise[
 10] from the same core of operative facts as a claim contained in the original petition,” *Ford*
 11 *v. Gonzalez*, 683 F.3d 1230, 1237 n. 3 (9th Cir.2012) (internal quotation marks omitted);
 12 (2) the remaining federal habeas petition will have been decided by the time the state
 13 courts act on the new habeas claims, triggering the onerous requirements for filing a
 14 second or successive habeas petition, 28 U.S.C. § 2244(b); or (3) both. Similarly, if a
 15 petitioner chooses to accept dismissal of the entire petition under *Rose v. Lundy*, 455 U.S.
 16 509, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982), he will very likely be barred from reasserting
 17 any of his claims in federal court by AEDPA's statute of limitations. In either event, the
 18 result is the same as to the unexhausted claims: The petitioner will lose the opportunity
 19 ever to present those claims to a federal habeas court. *Mitchell v. Valenzuela*, 791 F.3d
 20 1166, 1172 (9th Cir. 2015).

21 Because a petition may be deemed not “properly” filed after years of litigation, see,
 22 e.g., *Evans v. Chavis*, 546 U.S. 189, 200, 126 S.Ct. 846, 163 L.Ed.2d 684 (2006), it is
 23 generally impossible for a petitioner to know in advance whether he will be successful in
 24 bringing his dismissed claims back to federal court. Exacerbating this uncertainty in the
 25 context of this case is “California's unusual system of independent collateral review” in
 26 which “a prisoner seeks review of a lower court's denial of relief by filing an original

27 ¹ On October 10, 2022 Petitioner started her second round of habeas corpus to exhaust her claims (Orange County
 28 Superior Court Case No. M-20069. As of today, the superior court has not yet ruled on the petition. On December 9,
 2022 Petitioner has requested ruling under Cal. Rules of Court, rule 4.551(a)(3)(B).

1 petition for habeas corpus in the reviewing court,” rather than an appeal, and a “petition is
2 timely filed if it is filed within a ‘reasonable time,’ ” rather than within a set period of
3 time. *Banjo v. Ayers*, 614 F.3d 964, 968 (9th Cir.2010). See also *Mitchell v. Valenzuela*,
4 791 F.3d 1166, 1172 n.5 (9th Cir. 2015) (treating the denial of a motion to stay and abey a
5 habeas petition as **presumptively** dispositive of **unexhausted claims** because of the *ex*
6 *ante* danger that the petitioner will not be granted the benefit of statutory tolling for some
7 unforeseen reason.)

8 The procedure set forth in *Kelly v. Small*, 315 F.3d 1063 (9th Cir. 2003), unlike
9 the *Rhines* procedure, does nothing to protect a petitioner's unexhausted claims from
10 untimeliness in the interim. *King v. Ryan*, 564 F.3d 1133, 1141 (9th Cir. 2009). And
11 *Duncan v. Walker*, 533 U.S. 167, 121 S.Ct. 2120, 150 L.Ed.2d 251 (2001) and *Mayle v.*
12 *Felix*, 545 U.S. 644, 125 S.Ct. 2562, 162 L.Ed.2d 582 (2005), taken together, make
13 demonstrating timeliness of claims amended into federal habeas petitions after exhaustion
14 often problematic. *King*, 564 F.3d at 1141. While Petitioner has satisfied all three
15 conditions under *Rhine*, she should not be forced to go through a more cumbersome
16 procedure, both in the interests of justice and judicial efficiency.

17 For the reason stated above, whether there is imminent danger that the federal
18 statute of limitations will expire is not a considering factor under *Rhines*. Therefore, a stay
19 of the entire petition is proper under *Rhines* while Petitioner exhausts her potentially
20 meritorious claims.

21 Respectfully submitted,

22 Date: December 19, 2022

23 /s/ Xingfei Luo
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CERTIFICATE OF SERVICE

I certify that I filed the forgoing with the United States District Court, Central District of California. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

Dated: December 19, 2022

/s/ Xingfei Luo